United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1404

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

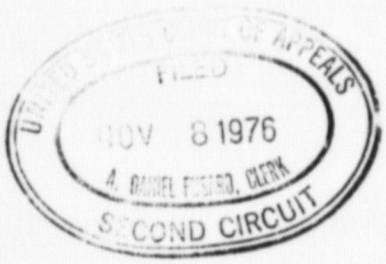
MARI-ANN DANISE,
HARRY LEVINE BENSON, and
HERBERT KAMINSKY,

Defendants-Appellants.

Docket No. 76-1404

BRIEF FOR APPELLANT
MARI-ANN DANISE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



PHYLIS SKLOOT BAMBERGER,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARI-ANN DANISE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

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BRIEF FOR APPELLANT
MARI-ANN DANISE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was error requiring reversal of the judgment to admit into evidence the handwritten words on the bank draft.

2. Whether it was error requiring reversal of the judgment to deny a continuance to depose Werner Barth about the diamond.

3. Whether the Government failed to prove that the interstate air flights were used to execute a scheme to defraud, thus requiring a reversal of the conviction on Count Three of the indictment.

4. Whether the Government's failure to prove Buhler's ownership of the diamond requires reversal of the conviction for violation of 18 U.S.C. §2314.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles H. Tenney) rendered August 25, 1976, convicting appellant Mari-Ann Danise of violation of 18 U.S.C. §§1343, 2314, in that she, having devised a scheme to defraud, used interstate and foreign wire communications and interstate and foreign transportation for the purpose of executing the scheme. Appellant Danise was sentenced to three years' imprisonment on each count, the terms to run concurrently. Execution of the sentence was suspended, and a four-year period of probation was imposed.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act, after trial counsel was relieved.

Statement of Facts

Appellant Danise, along with Herbert Kaminsky and Harry Levine Benson, were indicted (A.4[1]) for conspiracy to use telephones and interstate and foreign transportation facilities to execute a scheme to defraud Hans Buhler of two gems, a 9.88 karat diamond and an 8.35 karat emerald, which Buhler allegedly owned. They were also charged with the substantive crimes of executing a fraud on Buhler through the use of the telephone and interstate and foreign transportation facilities (18 U.S.C. §§2314, 1343).

The Government's theory of the case, as reflected by the indictment, was that Buhler was the legitimate owner of both the diamond and the emerald. In his opening statement, the prosecutor announced his intention to prove Buhler's ownership of the gems (A.145; 90[2]). Then, undaunted in his efforts to preserve the Government's theory, despite the record (see infra at 6-9), in his summation, the prosecutor announced that he had proved Buhler's ownership of the gems (A.146-149, 689-693) through Buhler's testimony and various documents introduced into evidence. The Government's position was that Buhler was

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[1]Numerals prefaced by "A" refer to pages of the Joint Appendix to Appellants' Briefs.

[2]Numerals in parentheses refer to pages of the transcript of the trial.

was induced by appellants to give them the two gems and that appellants did not intend to pay for the stones. Proof of Buhler's ownership of the diamond and of appellants' alleged inducement came entirely from Buhler himself, and Buhler's credibility was the key issue in the case.

A. Hans Buhler: His background and the issue of his credibility

Buhler is a Swiss national in the gem business. In 1969 he was convicted in the Swiss courts for embezzlement and using confiscated articles and falsifying records. He was sentenced to eight months in prison. Previously, in 1965, he had been convicted of embezzlement (209, 213-214). Despite this record, Buhler told the FBI agents from whom he sought assistance in this case that he had no criminal record except driving a car without a muffler (218). Buhler was described in a Government exhibit as a "shady character."

Buhler was so unresponsive to questions of defense counsel on cross-examination that the district judge remarked:

> I recognize that we're not following the rules, but this witness is so completely hopeless that we are not going to have a complete trial unless we have to actually put into evidence parts of these documents.
>
> * * *
>
> Why can't he answer the question?
>
> * * *
>
> Let's go ahead. Try and follow correct

procedure. We're just up against answers like "possibly" or "probably"

(457-458).

Thus, Buhler failed to respond to definite inquiries on cross-examination numerous times (e.g., 289-290, 301, 360, 368, 369, 443, 447, 448, 455). By his continually contradictory version of the alleged arrangements for the sale of the diamond to Kaminsky and Benson, including the sale price, commission, and profit, Buhler caused serious obfuscation of the circumstances of the alleged transaction. All of these factors were critical to evaluating whether there really was a stone involved, whether Buhler was the owner, and finally to Buhler's credibility.

In his interviews with FBI agents prior to trial, Buhler told them he had complete documentation of his ownership of the stones and of their legal importation into the United States (418; Government Exhibit 3507; A.134). Although subpoenaed to present his books and records (A.63), Buhler produced no such records at trial and testified that he had no history of the stone or bill of sale (489-490; 401) and no Customs documents to support his claimed importation of the diamond and emerald into the United States at New York and later at Los Angeles (230-231, 414, 418, 423).

B. Buhler's several versions of his first contacts with the gems

On the first day of trial, May 24, 1976, Buhler testified that he purchased a 9.90 karat diamond (119) jointly with a friend (121) for 510,000 Swiss francs, or about $185,000 (121). He claimed that he bought the diamond with a bank draft dated June 26, 1974 (A.132) drawn to himself on the Swiss Credit Bank. Handwritten by Buhler (120, 507) across the front of the draft was "Barth/Ring DI 990" (A.122; 508). This handwritten material was admitted into evidence over counsel's objection that it was not a business record (120). At trial, both Buhler and the prosecutor referred to this draft to Buhler with its handwritten notes as proof that Buhler had purchased the diamond (154, 155,[3] 690).

Buhler testified that shortly after he purchased the stone he brought it to New York to have it examined and graded (121). Although he had made prior contrary representations, Buhler testified that he had no documents to show that he brought the gems into the United States (230) and that none were necessary since he was bringing the stone to this country only for examination (414, 423).[4] The Government failed to produce any Customs records for New York (310). Later in the trial (484),

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[3]The Government referred to the document as "the Bank draft for Barth in Zurich."

[4]Counsel advised the court that this testimony was incorrect. A declaration must be made and a bond posted for a gem brought into the United States for examination (19 U.S.C. §1202, Subtitle 1, Schedule 8, Item 864-30).

counsel again advised the court that no Customs documents had been produced, and that they should have been made available. The district judge wondered why the Government had not produced them (484).[5] The Government responded that the defendants could obtain the documents by subpoena (485) and could comment on the failure to produce them (486). Defense counsel indicated that the Government had an obligation to correct Buhler's testimony if there were no documents (486).

The court recognized the importance of the records or the absence thereof as they affected Buhler's credibility and moral background (486). Later, however, the district judge inexplicably quashed a defense subpoena (A.87) for the records (623, 637).

The diamond was examined by the Gemological Institute of America in New York, and was cut to make it internally flawless. This process reduced the gem's weight to 9.88 karats. The diamond was said to have an "F" color on the scale used by the Institute. The work on the gem was paid for in cash, and, as Buhler acknowledged, the gem was receipted by Buhler (95-102) (Government Exhibits 1 and 2).[6]

On the second day of trial, confronted with documents that contradicted his version of the events, Buhler changed

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[5]Despite this belief, the judge was disturbed by what he considered to be defense counsel's implication that the Government suppressed the records (485).

[6]The dates of the report were June 14 and 17, 1976.

his testimony so that it would conform with the dates on the June 24 bank draft and the June 14 Gemological Institute of America report. Thus, Buhler testified that he brought the gem to New York for examination prior to paying for it (154-155). This testimony made the bank draft incorrect on its face because the document stated that the diamond weighed 9.90 karats, although on June 24, the date of the bank draft, the diamond weighed only 9.88 karats.

Buhler also suddenly recalled that, at the time he bought the 9.88 karat diamond, he had bought another, smaller, diamond from Barth which Buhler had sold for $12,000. Later, Buhler refused to answer the question of where on the bank draft it showed that a second diamond had been purchased, responding that the question was not important (509).

Buhler also testified that he had no bill of sale or history for the 9.88 karat diamond because he had bought it with cash (401) and had destroyed the memo he had received from Barth (401). Although he had written "Barth" on the draft, Buhler said he had actually bought the gem from a private client of Barth's (402).

C. Buhler returns in December 1974

In December 1974, Buhler traveled from Zurich, Switzerland, to Los Angeles (123).[7] The Government introduced a Swiss export document (Government Exhibit 5) to show that the stones had left Switzerland. Buhler testified that, upon entry into this country, he declared that he had property worth $100,000 (422). However, a stipulation was entered into between the Government and the defense that Buhler had entered the United States at Los Angeles without making any declaration of valuables (620, 637, 664).

According to Buhler, he took the stone to the Gemological Institute of America in Los Angeles for a second color examination because he was not happy with the color grading given in New York (428).[8] However, the receipt for the gem at the Institute at Los Angeles contained the name Kalmun von Czazy, and was not signed by Buhler or, in fact, by anyone. The Los Angeles report upgraded the color quality by one letter, to "E."

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[7] Buhler testified that in October 1974 he had been in South America and had been robbed of $110,000 while there.

[8] Defense evidence established that the color rating affected the value of the diamond.

D. Buhler hears from Hans Furer and Jim Brito

James Brito was president of James C. Brito Chaos, Inc. (517), engaged as a finder of imports and exports (518), and shared an office with appellant Danise ( ). Brito knew Hans Furer, a diamond dealer (519) and broker for Buhler (365).

According to Buhler, on December 22, 1974, after the diamond was examined, he flew from Los Angeles to New York. While in shops of the jewelry district, Buhler received a telephone call from Furer (129), as a result of which Buhler called and spoke to appellant Danise (130). He then went up to Danise's office (131). On arrival, Buhler met Danise and Kaminsky (132-133). Kaminsky took Buhler into a side office where only the two men were present and asked to see the 9.88 karat stone. Buhler said he did not have the stone with him (133).

Buhler called Furer in Zurich and asked if he could show the stones to Kaminsky.[9] After that conversation, Buhler displayed both the diamond and an emerald[10] to Kaminsky, and the latter wanted to take them for appraisal. Again Buhler called Zurich; this time, since Furer was not available, Buhler spoke

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[9]In earlier statements to the Swiss police, Buhler testified that he spoke to Brito and Furer at the same time (Government Exhibit 3515; 455-456).

[10]According to Buhler, the emerald had been obtained on consignment in October 1974, from Kothari Brothers in Bombay, India (122). Later, Buhler changed his testimony to say that he really bought two emeralds from India and paid $31,000 for both of them (Government Exhibit 5).

to James Brito (135).

As a result of his conversation with Brito, Buhler gave Kaminsky the diamond and the two Gemological Institute certificates (136). Kaminsky gave Buhler a receipt for the diamond, on consignment for $20,000 per karat (138), and left the office to get an appraisal.

E. Buhler testifies there [illegible] sale

Accordi[illegible]o Buhler, Kaminsky called the office shortly thereafter and neg[illegible]ciated with Buhler for the diamond. Buhler agreed to accept $19,800 a karat (139), making the cost of the diamond $195,624. Thus, Buhler's gross profit would have been $10,624.

While Kaminsky was out with the 9.88 karat diamond, Danise received a Telex offering her diamonds. According to Buhler, he assisted Danise in the money conversions (138).

Kaminsky called to ask Buhler for additional time to show the gem to a friend (139). Buhler agreed, and shortly thereafter, Kaminsky called back to say that he had found a buyer who would purchase at $22,800 a karat, a total of $225,800, but that Kamisky would keep the difference between the price Buhler wanted and the higher price as profit (140).

Kaminsky then appeared with Harry Levine Benson. Buhler asked for the diamond, but Kaminsky reported that he and Benson had put into a safe (141).

Kaminsky told Buhler to go to Chicago with Benson, where he would be paid (142). To replace the receipt Kaminsky had earlier given Buhler, Benson gave Buhler a new one for the diamond at $22,800 a karat (143).

In a private conversation, Kaminsky took back his receipt (143) and told Buhler not to tell Benson about the profit. Buhler then gave the emerald to Kaminsky. Kaminsky gave Buhler no receipt (145), but told Buhler to keep the $30,000[11] that was Kaminsky's profit from the sale of the diamond at the higher price and that Buhler would receive when Benson paid him. As payment for the sale of the diamond, Kaminsky would just keep the emerald (144).

Buhler and Benson left for Chicago (145-147). Buhler testified that at the airport Benson spoke to Kaminsky on the telephone (145). Buhler also related that in that conversation Kaminsky sold the emerald to Benson, but, Buhler testified, he did not learn about the sale until later that night (166).

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[11] The figure is actually $29,420.

F. Buhler's testimony shows that he overcharges Benson, but that he still makes little profit on the deal.

While on the plane to Chicago, Benson informed Buhler that the money would be available the next day (160). Buhler told him to pay $255,000 (160), $30,000 more than agreed.

Buhler testified that during the night at the Chicago hotel he heard Benson leave and return (164). The next morning, Benson told Buhler that the money would be in London.[12] It was in this conversation that Buhler learned that the emerald had been sold and put into Kaminsky's safe before the flight to Chicago (166). According to Buhler, Benson then offered to give Buhler a new receipt noting only the amount owed: $255,000.[13] Buhler refused this offer and prepared a receipt that included reference to a 9.88 karat diamond for $220,000 and to the emerald for $35,000, for a total price of $255,000. Benson signed this receipt (Government Exhibit 13) (168). Buhler testified that he noted that Benson's signature on the second receipt looked different than his signature on the first. According to Buhler, Benson said his arm hurt when he wrote it. The Government offered no expert testimony on fingerprints.

Buhler testified several times that the sale price of the diamond was $225,000 (173, 261, 262, 265, 273, 275, 279, 368), and that his profit would be $40,000 (261, 367).

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[12] Buhler had testified that he told Benson he was going to London for the Christmas holidays (166).

[13] Again, this was the incorrect amount, by Buhler's own testimony.

Buhler also testified that commissions were to be paid on the sale to Furer and Brito (244), that he, Buhler, would pay Furer's commission (262, 265, 272), and that Furer and Brito were to divide the money (245). Furer's commission was seven per cent of the profits (365) (see also infra at 16).

On several occasions during the trial, counsel highlighted the inconsistencies in Buhler's testimony concerning the sale price of the stones (259-261, 273-274, 283-285, 366-369; cf. 279-282).

Even the judge was confused by the variations in Buhler's testimony. As he explained at a sidebar:

> Now Kaminsky was supposed to sell the diamond and he was going to get a profit on it of the difference between the 215 or 225, whatever it was, and the 255. In other words, the witness was supposed to come out with $225,000 because he would owe the markup of $30,000 to Kaminsky. Instead of that he satisfied the obligation of the $30,000 by giving the emerald to Levine, Levine presumably having paid Kaminsky.
>
> (285).

The Assistant United States Attorney properly stated that the $30,000 emerald price was being used twice (286).

G. Buhler testifies he must make further trips

Buhler testified that he called Danise to tell her that he had to go to London for the money (172). Danise turned the phone over to Kaminsky (172). From the hotel, Buhler also called both Burer and Brito (173; see Government Exhibit 14).

Buhler testified he then returned to New York and went to Danise's office where Buhler told appellant Danise and Kaminsky of his intention to go to the police. According to Buhler, Danise asked him not to do that, and Kaminsky said that the money was in London (176).

Buhler flew to London on December 24, 1974. There was no money for Buhler at the designated place (179). Buhler called appellant Danise, who thought it was all a misunderstanding (180).

H. Enter Herbert Sachs

The next day, Buhler flew to Zurich, where he met Brito and his attorney, Herbert Sachs.

At trial, Sachs testified as a witness for the Government about alleged attempts made between December 27, 1974, and January 2, 1975, to collect $255,000 from Benson. He testified that his client, Jim Brito, had a substantial interest in the consummation of the sale of the diamond (521). Accordingly, Sachs explained at trial that he was interested in making sure that the sale was completed so that Brito would be paid (523). The situation was that if Buhler did not get his money, Brito would not get his commission (558, 563). Sachs believed that Brito was to get one-fourth of the commissions to be paid on $40,000, or $7,500 (567-568). Sachs also testified that he represented Brito as a defendant in a civil suit

begun by Buhler on a claim based on failure to pay for the gems (551-552). Brito paid for all of Sachs's expenses, and Sachs planned to bill Brito for legal fees for services in connection with the transaction (567). Defense counsel argued that Sachs's interest in the outcome of the transaction and in the interest of his client, Brito, substantially affected his credibility (718).

Sachs said that he learned of all the events prior to December 27, the date he arrived in Zurich (570, 573), from Furer and Brito (573). The next day, December 28, 1974, Sachs met Buhler, who also told him about the transaction (573). Sachs's understanding about the prior events from Brito and/or Furer was that the original communication with appellant Danise referred only to several small diamonds that were for sale -- not to the larger, 9.88 karat, diamond (574-576).[14] Sachs said that Brito learned about the large stone only after the events had occurred (576). Sachs also testified that Buhler gave the emerald to Kaminsky not as Kaminsky's share of the price of the diamond but as security for the money until he received his commission from the sale. According to Sachs's testimony, this commission of $35-40,000 was to be shared by Kaminsky, Danise, Mr. Danise, and Brito (569). Sachs also testified that there was a second agreement between Furer and Brito to share $15,000 commission (563).

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[14] This implicitly contradicts Buhler's testimony that Kaminsky asked to see the 9.88 karat diamond.

I. Testimony about events after December 27, 1975

Buhler testified that he was to meet Levine in Zurich to receive his money. Buhler called appellant Danise, who agreed that this was a good idea (181-182). However, Benson failed to appear (182). Sachs and Buhler called Danise at her home, and she said she had the money and would come to Zurich (182). According to Buhler and Sachs, appellant Danise did not want to travel with $255,000. Buhler testified that she rejected the idea of having the money delivered by Wells Fargo (183). Sachs testified that Wells Fargo had been agreed to as transmittor. Then in both a telephone conversation and a Telex dated December 30, 1974, appellant Danise was directed by Buhler and Sachs to give the $255,000 to Sachs's law partner, Mr. Hanrahan. In the Telex message, Buhler threatened to hold appellant Danise and Kaminsky criminally and civilly liable for failure to pay (Government Exhibit 17; 183-184, 535-538, 540-541). After this Telex, appellant Danise said that Buhler should return to New York for his money (185). Kaminsky said he wanted no responsibility for the transaction (185).

While all this was going on, Furer and Brito signed a commission agreement (A.133) on January 1, 1975. In the agreement, Furer agreed to give Brito fifty per cent of the $15,000 commission on the sale.

Appellant Danise then told Buhler to come to New York (186). He did so (192). Upon arriving at appellant Danise's office

(192-193), Buhler was advised that Benson had pledged the two gems as security against a Las Vegas gambling debt (193). Buhler testified that he threatened to go to the FBI, and that to prevent him from doing so, Kaminsky had appellant Danise type a guarantee dated January 3, 1975, in which she promised to pay $50,000 on January 4, 1975, $50,000 on January 13, 1975, and $125,000 on January 21, 1975.[15] The note stated that this was a civil transaction (Government Exhibit 20). It was typed on Chaos, Ltd., stationery, the name of Brito's firm. The name signed on the bottom was Danise's, but there was no handwriting verification of the signature.

Contrary to Buhler's testimony that Kaminsky had initiated the guarantee, Sachs testified that on the night of January 2, 1975, he and Buhler discussed an agreement of this nature and talked about Danise's signing it (580-581). Sachs testified that he told Buhler what would happen if Danise signed an agreement to pay and that a specific type of agreement would make it a civil matter (582-583).

On January 4, 1975, Buhler arrived to pick up his first $50,000 (196). At that time, Benson called to say that he had $60,000 and that Kaminsky had $50,000. According to Buhler, Kaminsky asked if Buhler would give a check for the remainder

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[15] This total is the amount consistent with Buhler's earlier trial testimony concerning the price per karat of the diamond. However, on cross-examination Buhler testified that he was willing to take a guarantee in this amount because appellant Danise said she did not have $225,000 (500).

of Benson's gambling debt. Buhler asserted that he had no private checks, but that he was carring with him blank trading checks (269, 356-357) that he could use. The checks did not belong to Buhler, and he had no interest in them (365). He had been carrying them around since December 11, 1974 (347-349) to deliver them as a favor to a friend (341, 345). The bank upon which the checks were drawn went bankrupt four months later (359).

Buhler went to Las Vegas to meet Benson (203, 380), first having gone to the FBI. When he met Benson in Las Vegas, Benson had neither the money nor the stones (206-208).

On January 10 or 11, 1975, Buhler filed a complaint against Brito with the Swiss police (475). In January 1975, Buhler filed a civil lawsuit against appellants here as well as against Brito in the New York County Supreme Court.

J. Counsel's motion to take Barth's deposition

At the commencement of the second day of trial, counsel for Benson[16] advised the court that he desired to take a deposition of Mr. Barth, but that he would be unable to do so for two days because Barth was not in Zurich. Counsel emphasized

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[16]The judge stated that he was considering the application only of Benson's attorney, who had entered the case late (491). However, when other counsel sought to explain their reasons for being given the time as well, the trial judge stopped them and told them there was no basis for arguing that the Government had suppressed the evidence (491).

the potentially critical nature of Barth's information as it would affect Buhler's credibility, particularly his claimed ownership of the gem. Counsel explained the difficulty of cross-examining Buhler without this information (150-151). The judge's resolution of the problem was to proceed with the trial (151).

On May 27, defense counsel sought a continuance to take Barth's deposition in Europe (488). The judge acknowledged that the information would be highly material on Buhler's credibility, and said that a continuance would not inconvenience the court because of the trial and holiday schedules. Then he left the matter to the Government (489-490).

On May 28, 1976, counsel for Benson advised the court that the previous day an investigator had seen Mr. Barth, who stated that he bought the stones from Buhler but that Buhler

had not bought the stones from him; and that Buhler bought small stones from others through Barth, but that the price of such stones was never higher than 30,000 francs (A. 78-79).

Later on, the court denied the motion for a continuance to depose Barth, stating that "no claim was ever made that Mr. Barth sold to Mr. Buhler a 9.88 karat diamond or any stone of that size" and therefore there was no credibility issue (636). Defense counsel advised the court that Barth also said that his dealings with Buhler never involved a stone of 9.88 karats (626). The court considered the matter closed (626, 636). Counsel made a motion to depose Barth (A.82), and that motion was also denied (A.86a).

After the verdict, counsel sought a new trial (A.88), asserting that he had been improperly and unfairly denied a continuance to depose Barth. Counsel also argued that 18 U.S.C. §2314 did not apply to holders of stolen property, and that the Government had charged that Buhler owned the diamond but had not established that fact. The motion was denied.

K. The trial concludes

In his summation, the Assistant United States Attorney argued vigorously that proof of Buhler's ownership of the diamond had been established (A.147), and he specifically relied on the handwritten notes on the Swiss bank draft.

In his charge to the jurors on the travel count of the

indictment, the judge told the jurors that the interstate travel had to be in execution of the scheme to defraud (797).

The jury failed to convict appellant Danise of the conspiracy, but found her guilty of the two substantive crimes.

ARGUMENT

Point I

IT WAS ERROR TO ADMIT INTO EVIDENCE THE HANDWRITTEN WORDS ON THE BANK DRAFT, AND REVERSAL OF THE JUDGMENT IS REQUIRED.

As proof of Buhler's ownership of the 9.88 karat diamond, the Government introduced into evidence (Government Exhibit 4, A.132) the bank draft for 510,000 francs payable to Buhler, with the words "Barth DI 990" written by Buhler across the face of the draft. The Government's position was that this established that Buhler had purchased the diamond. Counsel objected to the admission of the handwritten words, asserting that they were not a business record. The trial judge overruled the objection upon hearing testimony that Buhler himself had written the words.

Rule 803(6) of the Federal Rules of Evidence[17] establishes the requirements for admission of business records. The record is admissible if made at or near the time of the event recorded, if kept in the course of a regularly scheduled business activity, and if it was the regular practice of that business activity to make the record, unless the source of information or circumstances of preparation indicate lack of trustworthiness.

In this case, the requirements of the Rule were not satisfied with respect to the handwritten entry on the face of the bank draft. There was no explanation of the record-keeping procedure Buhler used in his business, so it was not

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[17]Rule 803(6) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

possible to know that this was a usual type of notation made by him. United States v. Halperin, 441 F.2d 612, 618 (5th Cir. 1971); United States v. Martin, 434 F.2d 275, 279 (5th Cir. 1970); see Palmer v. Hoffman, 318 U.S. 109, 113-114 (1943); Glass v. United States, 416 F.2d 767, 771-772 (D.C. Cir. 1969). In addition, there is no way of knowing when the writing was placed on the document, and there was no evidence that the writing was contemporaneous with the alleged event of paying Barth for the diamond.

The failure to comply with the business records requirements of the Rule makes the notes unreliable and untrustworthy. Bracey v. Herrinnga, 466 F.2d 702, 704 (7th Cir. 1972). Their admission into evidence was error and reversal is therefore required. In United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974), this Court found to be reversible error the admission of notes handwritten by a narcotics agent on a chemist's report. The notes stated that it was believed that the drugs came from the defendant. Similar circumstances required reversal in United States v. Brown, 451 F.2d 1231 (5th Cir. 1971); see also Sanchez v. United States, 293 F.2d 260, 269 (8th Cir. 1961). Frattini, Brown, and Sanchez refer to the earlier decision in United States v. Ware, 247 F.2d 698 (7th Cir. 1957), also involving memoranda made by narcotics agents:

> The exhibits or memoranda made by the narcotic agents however satisfy none of the requirements of [prior] section 1732. The

> government has not shown, in the language of the statute, that the statements were recorded in the regular course of business and that it was the regular course of business to make such memoranda or records. And even if memoranda such as the ones in question are regularly prepared by law enforcement officers, they lack the necessary earmarks of reliability and trustworthiness. Their source and the nature and manner of their compilation unavoidably dictate that they are inadmissible under [prior] section 1732. They are also subject to the objection that such utility as they possess relates primarily to prosecution of suspected law breakers, and only incidentally to the systematic conduct of the police business. Cf. Palmer v. Hoffman, supra.
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> Id., 247 F.2d at 700.

These concluding words of Ware indicate yet further reason for the untrustworthiness of the notes here. Buhler's testimony, having given no information about when the notes were made or the procedures involved, requires the conclusion that they were made for purposes of proving in litigation his ownership of the diamond.

In January 1975, Buhler filed a civil cause of action in fraud premised on his legitimate claim to the diamond. He had also gone to the FBI to seek criminal action against appellant Danise based on the same claim of ownership of the stone. The handwritten words on the face of the Swiss bank draft were admittedly written by Buhler, the person who had the only and very substantial interest in having it appear on the bank draft, which itself makes no reference to Barth, diamonds, or anything else relevant. Contrast Taylor v. Baltimore & Ohio

Ry. Co., 344 F.2d 281, 286 (2d Cir.), cert. denied, 382 U.S. 831 (1965). In these circumstances, without knowledge of when the entry was made and that it was made in the usual course of business, there is legitimate basis for believing the entry was made with an eye to litigation. Palmer v. Hoffman, supra, 418 U.S. 109; Bracey v. Herrinnga, supra, 466 F.2d at 705; Lindheimer v. United Fruit Co., 418 F.2d 606 (2d Cir. 1969); Puggioni v. Luckenbach S.S. Co., 286 F.2d 340, 344 (2d Cir. 1961). The situation in this case is closely analogous to that in Palmer, where this Court, in the decision that was subsequently affirmed by the Supreme Court, stated:

> It is clear then, that the words "regular course of business," as used in the decisions, have always included the concpet that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supply the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not bring such reports within the meaning of the words of art, "regular course of business." That the defendant railroad here had a regulation requiring its employees, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigation, did not suffice to include such reports within the "regular course of business," as those words have always been understood by lawyers and judges. For the

> "regularity" which justifies the exception is the kind which tends to "counteract the possible temptation to mis-statements," as Wigmore has noted. It follows that the phrase "regular course of business" never covered a single practice of making records with the purpose of supplying evidence in a highly probable law suit, when those records are made by persons with every "possible temptation to mis-statements."
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> Hoffman v. Palmer, 129 F.2d 976, 983 (2d Cir. 1942).

The Government relied heavily on this document as proof independent of Buhler's testimony at trial that Buhler owned the gem. Without the notation, the bank draft for 510,000 francs contained nothing to show how or for what purpose the money was used. The notation did not meet the standard of trustworthiness Rule 803(6) requires, and should have been excluded.

The admission of the evidence was highly prejudicial. The only other evidence about Buhler's ownership of the gem was Buhler's own testimony. Buhler's credibility was critical, see United States v. Brown, supra, and he had been seriously impeached on almost every other aspect of his testimony. Indeed, he even found it necessary to reverse his testimony concerning when he purchased the diamond. At first, he testified that he had bought the diamond before the examination of the stone in New York; faced with the report of that examination, which was dated before the date of the bank draft, and his own testimony that the draft represented the funds used to buy the gem, Buhler then said that he made the pur-

chase after the examination. Buhler also revised his testimony about the bank draft, initially saying that it represented funds for the 9.88 karat diamond, and then stating that it was also for the purchase of a second, smaller diamond.

In Buhler's credibility lay the whole of the Government's case. There was no other evidence that independently of Buhler's testimony demonstrated that Buhler had the diamond after June 17, 1974, or that he sold it to the appellants here. Thus, it was only through Buhler's testimony that the Government tried to show that Benson signed a receipt for the gems, and Danise the guarantee. No expert testimony on handwriting was presented. Interestingly, Buhler testified that Benson's alleged signature on the receipt did not look like earlier ones, and the guarantee was written on Brito's letterhead. Indeed, even Sachs's testimony is not helpful on this issue. Sachs's own knowledge related to events that occurred between December 27, 1974, and January 2, 1975. His information about the alleged sale of the 9.88 karat diamond to appellants on December 23, 1974, came from Brito, Furer, and Buhler. Further, according to Sachs, even Brito and Furer learned of the 9.88 karat diamond from Buhler, for their initial contact with Danise concerned several smaller stones.

Sachs's testimony about the events between December 27 and January 2,relate to telephone calls he had with appellant Danise. These calls were made while Danise was in New York and Sachs was in Zurich, and related to payment on the "transaction." Sachs insisted that Danise negotiated with him for payment. However, since Sachs never specifically stated which transaction he was referring to, it was up to the jury to decide whether he was

talking about the alleged sale of the 9.88 karat diamond or the deal involving the smaller stones. Further, Sachs's testimony about Danise's statements was seriously impeached by the fact that he represented Brito; that Brito, based on information he got from Buhler, believed he was entitled to a commission on an alleged sale and Sachs was committed to help Brito get his commission; and that, by the time of appellants' trial, Brito was a defendant in a civil lawsuit brought by Buhler in New York County. The jury could well believe that Sachs was trying as hard as possible to dissociate his client from the other defendants in Buhler's civil suit to save Brito from liability.

The weak nature of the Government's evidence made the admission of the unreliable and untrustworthy hearsay notes reversible error.

Point II

IT WAS ERROR TO DENY A CONTINUANCE TO DEPOSE WERNER BARTH ABOUT THE DIAMOND.

The key to the Government's case was the reliability of Hans Buhler. Buhler claimed that he owned the 9.88 karat diamond, that he had given it to Kaminsky for sale, and that he had received no payment for the gem. As the indictment and the prosecutor's opening and closing statements demonstrate, the lynchpin to both the Government's theory of the case and to a proper evaluation of Buhler's testimony was whether Buhler was testifying truthfully when he claimed that he owned the gem.

To contradict Buhler's testimony on this important question, defense counsel asked for a continuance to take the deposition of Werner Barth, a Swiss jeweler unable to come to the United States. This was the man Buhler asserted had been the finder and broker for the sale and to whom Buhler claimed to have paid 510,000 francs. The district judge denied the motion, even though he stated that a continuance would not produce any inconvenience to the court and despite defense counsel's sworn affidavit that Mr. Barth had agreed to give a statement and that Barth had advised that he had not sold to or been involved in the sale to Buhler of a 9.88 karat diamond.

The judge's denial[18] of the continuance was so improper as to constitute an abuse of discretion, and in the circumstances of this case, requires a reversal. United States v. Frattini, supra, 501 F.2d 1234; United States v. White, 324 F.2d 814 (2d Cir. 1963).

Judge Tenney denied the motion because he found no inconsistency between Buhler's testimony and the information counsel expected to elicit from Barth. The judge found that Buhler did not say he bought the diamond from Barth, but from a private client of Barth's, and that Barth's information would be only that Buhler never bought so large a diamond from Barth. However, this reading of the facts was incorrect. The

[18]The judge denied the motion on the record at trial. After trial, he denied a motion to perpetuate Barth's testimony in an endorsement on counsel's motion (A.86a).

affidavit of counsel stated both that Barth never sold a 9.88 karat diamond to Buhler and that, while Barth introduced his private clients to Buhler to enable him to buy their gems, the prices of the stones were between 10,000 and 30,000 francs, "but in no case higher."

Judge Tenney was also incorrect when he found that there was no showing that Barth was willing to testify, since counsel included such an assertion in his statement to the court and in his affidavit.

The critical significance of Barth's information can be seen by examining Buhler's testimony. The Government offered no proof except Buhler's testimony that in December 1974 Buhler actually had the 9.88 karat diamond. Sachs testified that he learned about the large stone from Brito, Furer, and Buhler in Zurich. Brito and Furer, who did not testify, learned about it from Buhler, since they were in Zurich in December. The Gemological Institute of America report, issued in Los Angeles in December, makes no reference to Buhler.[19] On other questions, Buhler's testimony was hopelessly inconsistent. As previously noted, Buhler changed his testimony about the chronology of the purchase.

Buhler also lied when he told FBI agents that he had proof of ownership of the gems and Customs documents showing valid

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[19] The only other proof that Buhler ever possessed the diamond was the New York Gemological Institute report dated June 14, 1974 -- six months earlier.

entry of the diamond and the emerald into the United States in June and December 1974. Despite a subpoena from counsel, Buhler produced no records other than the bank draft, which did not show any purchase from Barth, and the notes on the draft which were not authenticated as a reliable business record, and, in the circumstances, were untrustworthy (see Point I.) Nor did he produce any United States Customs documents. In fact, Buhler's testimony that he had declared that he had things of value when he entered the United States at Los Angeles in June was directly contradicted by a stipulation that no such declaration was made.[20]

Buhler also testified that on December 23, 1974, Furer told him to go to see Danise, and that when Buhler arrived in the United States, Kaminsky asked to see the 9.88 karat diamond. However, Sachs's testimony was that neither Jim Brito, Danise's associate, nor Furer knew about any 9.88 karat diamond. On this testimony, Kaminsky could not have known about the diamond, and thus could not have asked Buhler to show it.

Buhler's testimony about the sale price of the diamond was so absurd as to be incredible. Buhler's testimony was that he paid $185,000 for the diamond. He agreed with Kaminsky to sell it for $19,625 a karat, or a total of $195,624. According to Buhler, Kaminsky had persuaded Benson to buy the diamond for $22,800 a karat, or $225,800, but Kaminsky wanted

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[20]The judge inexplicably quashed a defense subpoena for New York Customs records.

to keep the $30,000 difference in price. It was agreed that Kaminsky would keep an 8.35 karat emerald Buhler had on consignment instead of the $30,000.

However, as noted, Buhler's testimony about the selling price of the stone was not the same throughout the trial. Buhler also insisted that the price he was to receive was $255,000. As the Assistant U.S. Attorney himself pointed out, Buhler calculated the value of the emerald twice.

Buhler's profit on the deal also renders his credibility dubious. Presumably, Buhler had to divide his profit with his partner. As for the commissions on the transaction, Buhler testified that he had to pay Furer and Brito seven per cent. Sachs's testimony went further: he said that the commission was $40,000, and was to be divided four ways. If Buhler was telling the truth about his many trips, several thousands of dollars in expenses would also necessarily be paid from the profits. Thus, on the explanation of the total transaction, Buhler's profit would be minimal.

Next, Buhler testified that on January 3, 1975, Kaminsky initiated the idea of a guarantee, including a provision for civil liability, to keep Buhler from reporting to the FBI what had happened. However, this is inconsistent with Sachs's testimony that on the previous night he had discussed just such a guarantee with Buhler. As for the guarantee itself, it was prepared on letterhead of Brito's company, and while Danise's

name appeared on it, there was no expert handwriting testimony. Thus, it was a jury issue to determine whether Buhler was being truthful about the document.

Finally, Buhler testified that he was willing to post blank bank notes as security for Benson's Las Vegas gambling debts in order to get the stones. These notes did not belong to Buhler and he had no interest in them, yet he was willing to post them as security.

This was the state of the record with respect to Buhler's testimony when Judge Tenney denied the motion for a continuance. The judge's earlier observation that Barth's information was important to evaluating Buhler's credibility certainly retained its validity. It was critical on the key issues as the Government framed the case. As in United States v. White, supra, where the defendant sought a continuance to obtain a witness to support his entrapment defense, there was an abuse of discretion in denying the adjournment the judge had said was possible without inconvenience.

As noted earlier and for the same reasons (see supra at 28-29), the testimony of Herbert Sachs does not render the error harmless. Sachs's credibility, like Buhler's, was challenged by the defense. Not only was Sachs Brito's attorney, but his testimony concerned conduct premised entirely on what Buhler had told him.

While the role of the jury is as a factfinder, this case uniquely demonstrates the critical role of the jury in its own

function. The contested issues of whether the 9.88 karat diamond existed and whether Buhler was lying, as well as the weakness of the Government's case, makes the denial of an opportunity to depose Barth reversible error.

Point III

THE GOVERNMENT FAILED TO PROVE THAT THE INTERSTATE AIR FLIGHTS WERE USED TO EXECUTE A SCHEME TO DEFRAUD.

Count Three of the indictment charged that appellant Danise violated 18 U.S.C. §2314 by causing interstate commerce to be used for the purpose of executing a scheme to defraud. Although the statute also makes it unlawful to cause interstate commerce to be used to conceal a scheme to defraud, that crime was not charged, and the judge did not instruct the jurors with respect to concealment.

The evidence produced by the Government shows that the scheme to defraud was completed on December 23, 1974, when Kaminsky and Benson put the diamond in their safe and Kaminsky had possession of the emerald. Since the transportation was not necessary for the purpose of executing the scheme, the Government failed to prove a violation of the statute. United States v. Maze, 414 U.S. 345 (1974). All that happened after the transfer of the gems, including the flight to Chicago, was purely in concealment of the crime. Even under Buhler's testimony, the post-December 23 activities came up in a haphazard,

unplanned way not designed to keep Buhler in a continuing relationship, but rather to keep the initial taking of the gems from being brought to the attention of the police.

The fact that the activities after December 23 were not planned as part of the alleged scheme or part of a plan to receive additional property distinguishes them from United States v. Sampson, 371 U.S. 75 (1962), where the Court found the mailing to be fore the purpose of executing the scheme when a defendant's original plan included the mailing. See also United States v. Ashdown, 509 F.2d 793 (5th Cir. 1975) (where the critical mailing was also part of the original scheme and had the effect of making the defrauded shareholders think they had made a good investment); United States v. Love, 535 F.2d 1152 (9th Cir. 1976) (where the court found a continuing relationship and new funds to be essential to the scheme even after some money was obtained.

To interpret this statute any other way is to render as surplussage the word "concealment" in the statute. Congress' use of both words envisioned a distinction between "execution" and "concealment." Indeed, the legislative history of the statute refers only to the transportation used by the victim for the purpose of obtaining for the "confidence man" the money being sought (1956 U.S. Code Cong. & Admin. News 3036; A.111-114). No reference is made to transportation used after the property is obtained. The difference between execution and concealment has been recognized (Lutwak v. United States, 344

U.S. 604, 617 (1953)), and this distinction was preserved by the statute. Since the Government did not prove the crime charged, the conviction on Count Three must be reversed.

Point IV

THE GOVERNMENT'S FAILURE TO PROVE BUHLER'S OWNERSHIP OF THE DIAMOND REQUIRES REVERSAL OF THE CONVICTION FOR VIOLATION OF 18 U.S.C. §2314.

Appellant Danise specifically adopts Point I(a) of the brief for appellant Kaminsky (Kaminsky brief at 17-22).

Point V

INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED IN THIS BRIEF, APPELLANT DANISE ADOPTS THE ARGUMENTS OF CO-APPELLANTS BENSON AND KAMINSKY.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARI-ANN DANISE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

Jan 8, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to counsel for co-appellants.

Eric J. Breen